

DISCUSSION RESPONSE

Thinking globally, acting globally

The case of corporate criminal liability and economic crimes

FRANZISKA OEHM — 31 May, 2016



As stated in [Ricarda's post](#), the African Union surprised the international community in 2014 with its proposal for the creation of an integrated African Court of Justice and Human Rights (ACJHR) drafted in the [Malabo Protocol](#). The planned criminal law chamber stirs academics as much as practitioners because of its not yet defined relationship to the International Criminal Court (ICC). The new chambers could either be upstream or equally ranked with the ICC. The latter possibly leads to withdrawals of African States from the Rome Statute of the ICC (Rome Statute). Therefore, the creation of a regional criminal court with jurisdiction over

the same crimes as the ICC might seem as an attempt to undermine the ICC and international criminal prosecutions in a heated political climate of a strained relationship between the ICC and many African States. The further concerns about extensive immunity clauses and lack of financial and human resources are certainly justified and have already been addressed, for example [here](#).

Corporate criminal liability in international criminal law

However, the Malabo protocol adds a so far unique feature of international criminal law (ICL): jurisdiction *ratione personae* over legal persons together with an extended list of economically related crimes such as corruption (Art. 28 I), illicit exploitation of natural resources (Art. 28 L) or money laundering (Art. 28 I bis). Consequently, the criminal chamber of the new African Court of Justice and Human Rights would have the power to prosecute corporations and individual business actors for all their criminally relevant misbehavior.

(Multinational) Corporations can internationally be involved in atrocities in many different ways. A corporation itself can illicitly exploit natural resources or launder money. In this case, a corporation can be the direct perpetrator. Furthermore, corporations do not only directly commit crimes; they can also participate to the commitment of other crimes listed in the draft statute. Several [academics](#) and [NGOs](#) stress that economic complicity played and still plays an immense role for the perpetration of the international core crimes genocide, crimes against humanity, war crimes and aggression. A corporation that maintains trade relations or purchases weapons to armed groups or governments can aid or abet the commission of the core crimes by furnishing the warring party with the necessary means.

The potential for the development of international economic crimes

In contrast to the Malabo Protocol, the Rome Statute does not allow for the prosecution of legal persons or of economic crimes such as corruption and it is not very likely that its *ratione materiae* and *personae* will be extended in the near future. Additionally, the Office of the Prosecutor (OTP) at the ICC is reluctant to indict natural persons for economic acts that would fall under the scope of ICC's jurisdiction. Consequently, this leads to impunity for business people in current ICL. Hence, the draft statute and the future criminal chamber at the African Court of Justice and Human Rights provide the singular possibility to tackle all different ways of involvement of corporations in the international crimes mentioned above. It is true that because of its extended list of crimes on the one hand and the different possible modes of liability and jurisdiction both over corporations and individuals on the other hand the Malabo protocol is – in respect to corporate criminal liability – a most progressive and unique piece of ICL.

Obstacles for effective prosecution of economic crimes

The concept of criminal liability for economic crimes as developed in the Malabo protocol also bears the risk of negative developments. In most cases, the commission of economic crimes such as corruption or illicit exploitation of natural resources requires strong involvement of governmental powers. The entangled relationship between corporations and governments plays a crucial role in the commission of the crime and the resulting violation of human rights. The extensive immunity clauses for “serving AU Head of State or Government, or anybody acting or entitled to act

in such capacity, or other senior state officials based on their functions, during their tenure of office“ (Art. 46 A bis) would therefore lead to impunity of those government officials who are alleged collaborators to crimes. In this light, the result of prosecutions will not be the prevention and reaction to the crimes that affect many African States but rather the shift from head of states to corporations for crimes that are committed collectively and should – in the interest of justice – be prosecuted collectively.

Moreover, corporate misbehavior should not be treated as a regional problem. One has to acknowledge the fact that the ICC, for various reasons such as non-global jurisdiction and strong influence of the United Nations Security Council, is equally not able to prosecute those crimes globally. Nevertheless, a strong regional focus as foreseen by the ACJHR can lead to the undesired impression that corporate misbehavior only takes place regionally.

Furthermore, taking into account the structure of (multinational) corporations, decision makers and therefore alleged perpetrators may be situated far away from the economic crime actually taking place. Regional prosecutions could therefore create the same problems the ICC is facing at the moment: namely lack of universal jurisdiction and weaknesses in investigations and law enforcement that may lead to impunity and selectivity.

Conclusion

The international community should not underestimate the critiques of ICL and especially corporate criminal liability expressed throughout the Malabo protocol. The implementation of liability for economic crimes has a great potential for ICL to overcome critiques of selective and

Africa-centered prosecutions at the ICC because most corporations are incorporated in regions that have not been part of ICC investigations so far. If regional chambers will be able to serve as first instance courts in addition to the ICC, this could be a future role model for international criminal justice. Nevertheless, international corporate crimes are a global problem and should therefore preferably be prosecuted globally and consistently. The Malabo protocol and its expressed idea of corporate criminal liability may hopefully affect future discussions worldwide and contribute to the development of ICL with a new perspective and strong advocacy for corporate criminal liability deriving from the African Union.

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